

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2017-305-E

IN RE:

Request of South Carolina Office of
 Regulatory Staff for Rate Relief to
 SCE&G Rates Pursuant to S.C. Code Ann.
 § 58-27-920

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)
) **SCE&G'S RESPONSE IN**
) **OPPOSITION TO AND MOTION TO**
) **STRIKE THE SOUTH CAROLINA**
) **OFFICE OF REGULATORY**
) **STAFF'S MOTION TO AMEND**
) **REQUEST**

Pursuant to 10 S.C. Code Ann. Regs. § 103-829(A), South Carolina Electric & Gas Company ("SCE&G" or the "Company") submits this Response in Opposition to and Motion to Strike ("Motion to Strike") the Motion to Amend Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920 ("Motion to Amend"). SCE&G also incorporates herein by reference its Motion to Dismiss and Request for Briefing Schedule and Hearing on Motion to Dismiss ("Motion to Dismiss"), which was filed with the Public Service Commission of South Carolina ("Commission") on September 28, 2017. For the reasons set forth herein and in its Motion to Dismiss, the Motion to Amend should be denied. SCE&G also respectfully requests a hearing on the Motion to Amend. In support thereof, SCE&G would respectfully show as follows:

I. The relief sought in the Motion to Amend is not permitted by S.C. Code Ann. § 58-27-920.

In the original Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920 ("Request"), the

Office of Regulatory Staff (“ORS”) sought a Commission order requiring SCE&G to “immediately suspend revised rates collections from its customers” pursuant to S.C. Code Ann. § 58-27-920 (“The commission may, after a preliminary investigation by the Office of Regulatory Staff and upon such evidence as to the commission seems sufficient, order any electrical utility to put into effect a schedule of rates as shall be deemed fair and reasonable....”) (emphasis added). Request at ¶18. As SCE&G stated in its Motion to Dismiss, the Request, among other things, violates the terms of S.C. Code Ann. § 58-27-920 in that it sets forth no evidence of a preliminary investigation,¹ is based on unsupported allegations which are not evidence, and, if granted, would result in insufficient, unjust, unreasonable, and confiscatory rates without any factual basis for finding that the rates are “fair and reasonable” or “just and reasonable.” Mot. to Dismiss at 3-5.

The Motion to Amend suffers from the same deficiencies as the Request and therefore should be rejected or stricken by the Commission. Because ORS seeks to amend the Request, the Motion to Amend must comply with the same statutory requirements governing requests for relief under S.C. Code Ann. § 58-27-920.

¹ In fact, the Request itself reflects that no preliminary investigation was performed, despite the requirements of S.C. Code Ann. § 58-27-920. By its plain language, the Request is based upon an advisory opinion issued by the South Carolina Attorney General dated September 26, 2017. *Op. S.C. Att’y Gen.*, 2017 WL 4464415 (Sept. 26, 2017) (“Opinion”) and a vague allegation that SCE&G failed to disclose information that should have been disclosed. The Opinion is insufficient to qualify as a preliminary investigation and is not evidence upon which the Commission may modify SCE&G’s rates pursuant to S.C. Code Ann. § 58-27-920. Nor does ORS present any evidence to support its claim that SCE&G failed to disclose information, provide any indication as to what information SCE&G failed to disclose, or demonstrate that such information “would have appeared to provide a basis for challenging prior requests.” Instead, ORS relies solely upon unsubstantiated and conclusory assertions without any support whatsoever. Consequently, the Request fails to provide evidence that suspending the authorized revised rates would result in a schedule of rates that is fair and reasonable.

Specifically, Commission Regulation 103-828 provides that:

any modification or supplement to a pleading shall be deemed an amendment to the pleading, and shall comply with the particular requirements of content and form for the type of pleading so amended. Upon its own motion or upon motion duly filed by a party of record, the Commission may for good cause decline to permit, or may strike in whole or in part, any amendment.

Therefore, the Motion to Amend may only be granted if it meets the “particular requirements of” S.C. Code Ann. § 58-27-920.

As is the case with the Request, the Motion to Amend further reflects that no preliminary investigation has been performed with respect to the content and structure of the Company’s current schedule of rates and charges. Importantly, and fatal to the Request and the Motion to Amend, there is absolutely no evidence showing the impact on SCE&G’s financial integrity of applying the Toshiba Corporation payment (“Toshiba Payment”) differently than how the Company currently accounts for such payment.² Further, neither the Request nor the Motion to Amend sets forth a schedule of rates or charges that is represented to be “fair and reasonable” or “just and reasonable” if implemented by the Commission. Instead, the Motion to Amend, without any investigation, justification, evidence, or substantive explanation, seeks to have the Commission determine the application of the Toshiba

² For example, the Motion to Amend requests that the Commission consider how customers will realize the value of the Toshiba Payment. Mot. to Amend at ¶15. Further, the Motion to Amend is devoid of any assertion that an investigation has yielded competent evidence reflecting the impact on SCE&G of applying the Toshiba Payment in a manner differently than as currently applied by the Company. The reason there is no evidence presented of the impact on SCE&G is because such evidence would show clearly and without doubt that misapplying the Toshiba Payment would result in an unconstitutional taking of the Company’s property and in serious harm to the financial integrity of the Company.

Payment in this docket absent any consideration of the Company's capital costs in V.C. Summer Units 2 and 3 ("Units"), to which the Toshiba Payment directly relates.

For these reasons, the Motion to Amend (in addition to the Request) fails to satisfy the statutory requirements for requests for relief under S.C. Code Ann. § 58-27-920; therefore, good cause exists for the Commission to reject or otherwise strike the Motion to Amend.

II. The issues raised in the Motion to Amend should be considered only as part of an abandonment petition filed by the Company and requiring otherwise would result in an unconstitutional taking of the Company's property.

Good cause also exists for the Commission to deny the Motion to Amend on the grounds that the relief sought should be considered, not in the instant proceeding, but as part of an abandonment petition filed by the Company pursuant to the Base Load Review Act, S.C. Code Ann. § 58-33-210, *et seq.*, or other statutory, common law, or constitutional provisions. While the Company has stated in various filings and publicly that it intends to apply the Toshiba Payment for the benefit of its customers, SCE&G asserts that the determination of how these funds should be applied should only be made while also considering the impact of the capital costs associated with the abandonment of the Units. To do otherwise would result in an unconstitutional taking of the Company's property, jeopardizing its financial integrity.

In Docket No. 2017-244-E, SCE&G filed a Petition for a Prudency Determination Regarding Abandonment, Amendments to the Construction Schedule, Capital Cost Schedule, and Other Terms of the BLRA Orders for the V.C. Summer

Units 2 & 3 and Related Matters (“Abandonment Petition”)³. As part of the Abandonment Petition, SCE&G sought approval to update the capital costs associated with the Units as of September 30, 2017, along with other costs related to the abandonment. The Company also proposed to make mitigating adjustments, including application of the Toshiba Payment. Importantly, however, the Abandonment Petition reflected a comprehensive approach to the issues pertaining to the abandonment so as to properly balance the concerns and interests of SCE&G’s customers with preserving the financial integrity of the Company so that it can continue to provide safe and reliable electric services.

The Motion to Amend, however, seeks to require SCE&G to implement only one component of the complex financial issues relating to the abandonment of the Units in the absence of other appropriate relief recognized by statutory law, common law, and constitutional provisions. Attempting to address the single issue of the Toshiba Payment in isolation would create substantial financial uncertainty for the Company and its customers and investors, thus significantly impacting its economic integrity, its creditworthiness, and, as a result, its long-term ability to provide customers with safe and reliable electric services.

Similarly, SCE&G currently is charging revised rates as authorized by Commission Order No. 2016-758, dated October 26, 2016, in Docket No. 2016-224-E (“Revised Rates Order”). The Revised Rates Order authorizes SCE&G to recover its

³ The Company voluntarily withdrew on August 15, 2017, its petition in Docket No. 2017-244-E in deference to certain legislative inquiries. However, the Company retains the right to file an abandonment petition and/or other requests at any time in the future.

approved cost of capital as applied to the incremental construction work in progress (“CWIP”) associated with the Units through June 30, 2016. The relief sought in the Request and the Motion to Amend would eliminate the revised rates, and reduce SCE&G’s schedule of rates, resulting in SCE&G being denied the opportunity to earn its approved cost of capital as applied to the incremental CWIP associated with the Units as well as its approved costs of capital in general, thereby violating constitutional, statutory, and common law principles and directly violating S.C. Code Ann. § 58-33-280(B) (“A utility **must** be allowed to recover through revised rates its weighted average cost of capital applied to all or, at the utility's option, part of the outstanding balance of construction work in progress, calculated as of a date specified in the filing.”)(emphasis added).

Consequently, granting the relief requested in the Motion to Amend would result in an unconstitutional taking of SCE&G’s property. The Fifth Amendment of the United States Constitution provides that “[n]o person shall be . . . deprived of . . . property, without due process of law, nor shall private property be taken for public use, without just compensation.” Article I, § 13(A) of the South Carolina Constitution echoes these principles: “private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property.”

These broad constitutional principles take center stage in the context of utility ratemaking because of the unique services that utility companies provide to the public. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (“Although their

assets are employed in the public interest to provide consumers of the State with electric power, they are owned and operated by private investors. This partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment.”). Acknowledging the unique character of this industry, many statutes that regulate the setting of utilities rates, including S.C. Code § 58-27-810, require that such rates be “just and reasonable.” *See, e.g., Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1175 (D.C. Cir. 1987) (“The Federal Power Act . . . also requires that rates be ‘just and reasonable,’ and courts rely interchangeably on cases construing each of these Acts when interpreting the other.”).

Courts of the last half century have widely held that whether a rate is “just and reasonable” “necessarily require[s] a ‘balancing of the investor and consumer interests.’” *Id.* at 1176 (quoting *FPC v. Hope Natural Gas*, 320 U.S. 591, 603 (1944)).

Among other things, investor interests include:

the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.

Hope Natural Gas, 320 U.S. at 603. Ultimately, the return for the utility company “should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain credit and attract capital.” *Id.*

Where a rate fails to appropriately strike this balance, it violates the Takings Clause and results in the confiscation of the Company’s property. *See Duquesne*, 488

U.S. at 307 (“The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory.”). Ultimately, “[i]f a rate does not afford sufficient compensation, the State has taken the use of the utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.” *Id.* at 307.

Here, the Motion to Amend requests that the Commission “consider the most prudent manner by which SCE&G will enable its customers to realize the value of” the Toshiba Payment. Mot. To Amend at 1. As previously noted, however, the Toshiba Payment will form an important part of a larger consideration—in the context of an abandonment petition—about the amounts that SCE&G should recover for its capital investment in the expansion of the nuclear facility. Applying the Toshiba Payment in any manner before this larger consideration has taken place—through ratemaking or otherwise—would leave the Company with insufficient operating capital, threaten its ability to raise future capital, and, consequently, subject SCE&G to serious financial instability. Not only would this contravene the well-established standards requiring a balancing of customer and investor interests, but also it would constitute an unconstitutional taking in that it would deprive SCE&G of sufficient compensation and confiscate its property in violation of the Fifth and Fourteenth Amendments. *See, e.g., Duquesne*, 488 U.S. at 312.

For these reasons, the Motion to Amend should be denied or otherwise stricken and the Commission should decline to determine the application of the Toshiba Payment in a vacuum as requested in the Motion to Amend and the Request. Rather,

the Commission should consider these issues only in the context of a comprehensive analysis that takes into consideration all aspects of the Units, thus properly balancing the interests of customers, investors, and the Company. To do less could result in serious financial harm to the Company and to investors, and, ultimately, result in harm to customers who rely on the Company for safe and reliable electric services.

CONCLUSION

For the reasons stated above, SCE&G respectfully requests that the Commission reject or otherwise strike the Motion to Amend and grant such other and further relief as is just and proper.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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